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A Comparative Analysis of European and American Environmental Laws: Their Effects on International Blue Chip Corporate Mergers and Acquisitions

By G. NELSON SMITH, III*

I. INTRODUCTION

Over the past decade, international transactions have played a significant role in the development of many multibillion dollar corporations. American corporations have used innovative techniques such as leveraging and leveraged buy outs¹ to purchase foreign companies² and have

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1. Leverage has been defined by Black's Law Dictionary as:

[a] The ability to control an investment by a small amount of outlay such as a down payment;

[b] The use of a smaller investment to generate a larger rate of return through borrowing; and

[c] The effect on common stockholders of the requirements to pay bond interest and preferred stock dividends before payment of common stock dividends.

BLACK'S LAW DICTIONARY 816 (5th ed. 1979).

Leveraging or a leveraged buy out can take a variety of forms. As one author has noted, "The common feature is that assets of the acquired corporation are used to finance the acquisitions." Sherwin, *Creditor's Rights Against Participants in a Leverage Buyout*, 72 MINN. L. REV. 449 (1988).

2. The largest leveraged buy out in history was that of RJR Nabisco Inc. for 24.7 billion dollars by Kohlberg Kravis Roberts Inc. (KKR). The reason for the large price tag was that "the company took shape from a cascade of large mergers over more than a decade." *The Epic Leverage Buyout of RJR Nabisco: A Daring Megadeal and Its Daunting Challenges*, MERGERS & ACQUISITIONS, July-Aug. 1989, at 61. RJR Nabisco serves as an ideal case study into how a leveraged buy out takes place:

The ultimate target was formed in 1985 with the merger of R.J. Reynolds Industries Inc. and Nabisco Brands Inc. in a \$4.9 billion deal. Before that, the Nabisco side was

issued junk bonds³ to increase their acquisition power.⁴ These types of international acquisitions and expansions have raised new and interesting legal questions. Most of these issues can be resolved by the application of American law, since the parent corporation is usually based in or has some connection to the United States. On the other hand, resolution of questions of an environmental nature often requires application of foreign law because the law controlling environmental issues is generally the law of the country where the environmental site is located.

Most of the blue chip mergers and acquisitions involve European subsidiaries. Often, these European subsidiaries, like their American counterparts, have severe environmental problems. These environmental problems are complicated further by the fact that European hazardous waste laws and methods of treatment are at least ten years behind American environmental laws.⁵ Consequently, Europe will be looking to American laws and regulations to develop their own merger and acquisition environmental laws.

The issue of which environmental liabilities are acquired when a merger involving a European subsidiary takes place in America is relatively new. This Article explores the effects environmental laws and liabilities can have on an international blue chip merger or acquisition. This Article also outlines the major American and European environ-

crafted in 1981 through the \$1.9 billion merger of Nabisco Inc. and Standard Brands Inc. while Reynolds' active acquisition program snared Del Monte Corp. for \$619 million in 1979 and Heublein Corp. with a \$1.4 billion price tag in 1982.

Id.

The international effects of the leveraged buy out become apparent when one looks at the international acquisitions and selling mechanisms used in the RJR Nabisco leveraged buy out. More than five billion dollars of the overall purchase price was supplied by Japanese Banks, and other portions originated in Europe. *Id.* at 62. In May 1989 RJR decided to sell five of its European businesses. They included three U.K. Units—Walkers in potato chips and snack foods, and U.K. Biscuits in cookies and crackers. *Id.* at 63. Two other biscuit companies, the Belin Group in France and Saiwa in Italy, were also put up for sale. The five businesses accounted for 80 percent of the 1988 sales and operating profits of International Nabisco Brands. *Id.*

3. For a definition of junk bonds, see Comment, *Junk Bonds: Do They Have a Value?*, 35 EMORY L.J. 921 (1986). In the Article, the author describes junk bonds as "high yield, high risk bonds which can be classified into two major categories. The first category is that of bonds which were investment grade when originally issued, but which have subsequently been downgraded." *Id.* at 922 (footnote omitted). The second category can be further subdivided into two subcategories, "bonds issued by low-rated companies simply as a means of financing ordinary operations, and junk bonds issued in connection with more extraordinary corporate take-over transactions." *Id.* at 922-23 (footnotes omitted).

4. *Id.* at 929-31.

5. Freadhoff, *Environmental Firms See Promise In Expansion Into Western Europe*, Investor's Daily, Aug. 14, 1990, at 28, col. 1.

mental laws which affect blue chip corporations attempting a merger or acquisition.

II. ENVIRONMENTAL PROBLEMS CONFRONTED BY CORPORATIONS WHICH SEEK TO PURCHASE BLUE CHIP CORPORATIONS WITH EUROPEAN INVESTMENTS

While there are an incredible number of complex environmental questions which arise with the purchase of American investments, the problems potentially faced by a corporation which seeks to acquire a corporation with European investments are even more numerous. First, in terms of obtaining merger and acquisition information, it generally takes two to three times longer to gather the necessary information for European subsidiaries than for wholly-owned American corporations.⁶ Moreover, even after a lengthy search, the analyst will receive only approximately twenty percent as much information on the European subsidiary as it will receive on the U.S. portion of the company.⁷ The lack of European information is most prevalent in transaction related activities⁸ such as information of an environmental nature.

The problems associated with purchasing European assets are complicated further by the individuality of each European state. There are currently twelve different currencies used and nine different languages spoken in Western Europe.⁹ These cultural differences affect how business transpires in Europe. As noted by one author, "The Sicilian will still want his coffee different from the North European."¹⁰ Similarly, the fluctuation of the dollar makes it even more difficult to predict with any type of accuracy the potential cost of acquisition.

The most troublesome environmental problem for potential purchasers of European corporate investments is the lack of consistent enforcement of environmental laws. Nevertheless, American law implies that American environmental principles should be applied when an American company acquires a European investment and there are no

6. Chwalek, *International Mergers and Acquisitions: Search and Screen: Creative Detective Work in Acquiring Overseas Firms*, MERGERS & ACQUISITIONS, Jan.-Feb. 1990, at 65.

7. *Id.*

8. *Id.* at 66.

9. Krneta, *International Mergers and Acquisitions: The Technology Kicker: M & A Stimulus Beyond 1992*, MERGERS & ACQUISITIONS, Sept.-Oct. 1988, at 56, 57.

10. *Id.* at 58.

comparable European laws applicable.¹¹ Mr. Leonard Nathanson, Associate Director of Corporate Development of ITT Corporation, acknowledged the following concerning the recent acquisition of a European company:

In a recent transaction with a European seller, they were truly surprised by the emphasis we put on environmental matters, not only in terms of U.S., but in terms of European components as well. They were surprised to find environmental consultants flying in and checking out the operations, by the issues raised by us, and the indemnities negotiated.

In the U.S., I have found both as a buyer and a seller in the past five years, that environmental matters invariably come up as a significant part of the negotiation process.¹²

Although it may be extremely difficult for acquiring corporations to obtain hazardous waste documentation on a blue chip corporation with European subsidiaries, obtaining such information is not impossible. In 1989 the United Nations Environment Program (UNEP) held the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.¹³ Two of the main purposes of the Basel Convention were to "[e]nsure that persons involved in the management of hazardous wastes or other wastes take . . . such steps as are necessary to prevent pollution due to hazardous wastes and other wastes arising from such management and, if such pollution occurs, to minimize the consequences thereof for human health and the environment."¹⁴ Moreover, article 4 of the UNEP agreement requires that information about a proposed transboundary movement of hazardous wastes and other wastes be provided to the states concerned.¹⁵

The Basel Convention also pursues international cooperation, calling for the "transfer of technology and management systems related to the environmentally sound management of hazardous . . . and other wastes."¹⁶ The Convention implies that corporations, including Euro-

11. Executive Order No. 12114, 44 Fed. Reg. 1957 (1979), *reprinted in* 42 U.S.C. § 4321 (Supp. 1990).

12. *Roundtable: Managing the Environmental Risks in Acquisitions*, MERGERS & ACQUISITIONS, July-Aug. 1989, at 28, 40.

13. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *opened for signature* Mar. 22, 1989, U.N. Environment Programme (Agenda Item 3), U.N. Doc. UNEP/Z/6 (1989), *reprinted in* 28 I.L.M. 649, 657 (1989) [hereinafter *Basel Convention*].

14. *Id.* art. 4(2)(c).

15. *Id.* art. 4(2)(f).

16. *Id.* art. 10(2)(d).

pean corporations, must ultimately take responsibility to ensure that proper procedures are followed to stop hazardous waste spills and leakages. The Basel Convention also calls for the development of liability and compensation procedures by the member states for damage resulting from the transboundary movements and disposal of hazardous wastes.¹⁷ The Convention also requires the member states to inform all other states once they become aware of an accident.¹⁸ Each year, each member state is required to transmit to the Conference of the Parties information regarding accidents involving hazardous wastes.¹⁹

All of these provisions indicate that corporations which seek to merge or acquire blue chip corporations with European environmental problems may not only inherit extremely extensive liability problems, but may also be inheriting tremendous administrative problems as well. Until recently, many European subsidiaries were not required to maintain documentation on their hazardous waste sites. Consequently, those corporations seeking to obtain European investments will have to generate the documentation on hazardous waste problems from scratch. The direct effect of such initial generation of this information is that to comply with the Basel Convention, the acquiring corporation may be compelled to do an environmental assessment that far exceeds the normal environmental assessment if such documentation were available, and would involve more time and money. Further, if contamination is found on the site, the convention seems to indicate that corrective action be taken, and that UNEP be informed of the action taken.

The European Community (EC) has also proposed a directive to give both corporations and private citizens access to information on hazardous waste problems that damage the environment.²⁰ The EC recognized that it needed to devise ways of improving public access to information on environmental problems held by European authorities. This EC proposal was the result of the recognition of the numerous disparities between the laws in force in the member states concerning access to data on the environment. The EC realized that this proposal would also be cost efficient since the obligations imposed by the directive would place no new administrative or financial burdens on businesses.

The directive establishes the right to access information on the environment held by public authorities. Access is guaranteed to "any natural

17. *Id.* art. 12.

18. *Id.* art. 13(1).

19. *Id.* art. 13(3)(f).

20. *Commission of the European Communities, Proposal For Council Directive on the Freedom of Access to Information of the Environment*, 1988 O.J. EUR. COMM. (No. C 335) 5 (1988).

or legal person without their having to display an interest."²¹ This data includes all data of a factual or legal nature on public or private hazardous waste discharges which are likely to damage the environment or endanger human health, animals, or plants.²² This hazardous waste documentation not only includes information supplied by the European entity that the corporation seeks to acquire or merge with, but it also includes all information involving hazardous waste matters from prior owners of the company, as well as other prospective buyers.²³ According to this draft proposal, the refusal to provide such hazardous waste information would have to be explained in writing²⁴ and could be appealed.²⁵

Even if this proposed directive is adopted, many important documents which may exist regarding hazardous waste problems of the European investments may still be kept from the interested investor. Article 8 of the EC proposal provides several exceptions to the access to information, which include the secrecy of international negotiations, the secrecy of governmental proceedings, and the secrecy of procedures brought before the courts. These exceptions conceivably could include much of the information that a blue chip corporation merging or acquiring an international blue chip corporation with hazardous waste sites would be interested in, such as failed international mergers and legal and administrative settlements.

In spite of the hodgepodge of potential environmental problems, the mergers and acquisitions of blue chip corporations with European subsidiaries is at an all-time high. On the question of assuming potential environmental liabilities through mergers and acquisitions, petroleum, mining, and chemical and heavy manufacturing lead the list of potential environmental risks.²⁶ However, the European electrical and electronics industry registered over one hundred cross-border deals in 1989.²⁷ Similarly, acquisitions of European chemical and pharmaceutical companies accounted for some one hundred twenty deals totaling over four billion

21. Basel Convention, *supra* note 13, art. 3.

22. *Id.* art. 2(a).

23. *Id.* art. 2(b).

24. *Id.* art. 6.

25. *Id.* art. 7.

26. See Heller, *Environment Tops the List of Merger Woes*, CHEM. WK., Feb. 7, 1990, at 14, 15 (Comments by George Pilko).

27. Holmes, *Cross Border M & A Europe's Shopping Spree*, MERGERS & ACQUISITIONS, May-June 1990, at 12 [hereinafter *Europe's Shopping Spree*]. The electrical and electronics industry transactions include the Siemens/GEC carve up of Plessy, the attendant merger of GEC and Alsthom in power equipment, AT&T in Italy, and GE's acquisition in Hungary. The banking and finance sector was primarily led by Deutsche Bank's white knight takeover of U.K. Merchant Bank Morgan Grenfell. *Id.*

dollars.²⁸ Examples of key chemical and pharmaceutical acquisitions include France's state-owned Rhône-Poulenc's purchase of the Orkem chemical corporation and the Smith-Kline-Beecham transatlantic merger which triggered a major shake-up in the pharmaceutical industry.²⁹

The reasoning behind this sort of black widow attractiveness of European investments can be understood by looking at the European productivity market. Since 1982 the production costs in Europe have climbed over thirty percent, while in the United States productivity costs have remained virtually unchanged.³⁰ Moreover, unlike the United States, many EC countries have labor and social welfare laws which virtually prevent a company from reducing its workforce under reasonable terms and within a practical time frame, even if the company's survival depends on it.³¹ Finally, in 1992 a unified consumer market will be established in Europe which will encompass approximately 300 implementing directives, 320 million people, and a purchasing power of 280 billion dollars.³² The result of such a large market is a move towards more mergers and large-sized companies.³³ There is no doubt that such a single market "will create new perspectives and opportunities for a European economy that many observers had given up for dead."³⁴

The European market is something that many of America's largest corporations have already recognized as a sound investment. In 1989 the list of major corporations acquiring concerns in Europe was a long one. The list included Ford, General Motors, General Electric, Emerson Electric, Gillette, and International Paper.³⁵ Japanese buyers were also interested in Europe, accounting for at least 55 deals valued at 1.7 billion dollars.³⁶ At least seven Japanese firms made purchases of fifty million dollars or more, including Fuji Photo Film, Bank of Yokohama, Mitsubishi, Kao Corporation, Ajinomoto, Asahi Life, and Nomura.³⁷

In short, the number of merger transactions in Europe is growing. In 1989 there were at least thirteen megadeals of one billion dollars or more (up from six the previous year), another seventy-two topping the one hundred million dollar range, and forty-three in the fifty to one hun-

28. *Id.*

29. *Id.*

30. Krneta, *supra* note 9, at 58.

31. *Id.*

32. *Id.* at 57.

33. *Id.*

34. *Id.*

35. *Europe's Shopping Spree*, *supra* note 27, at 14.

36. *Id.*

37. *Id.*

dred million dollar range.³⁸ Although a number of large deals went through at undisclosed prices, about ninety percent of the approximately eleven hundred deals fell in the middle market category of deals of less than fifty million dollars.³⁹

These statistics show that the popularity of mergers and acquisitions involving European investments is increasing, in spite of the potential environmental liabilities involved. Thus, it is critical that American corporations be familiar with applicable American and European hazardous waste laws before venturing into such a transaction.

III. AMERICAN ENVIRONMENTAL LAW

While much has been written recently on corporate successor liability in environmental matters,⁴⁰ little has been written on the merger and acquisitional aspect of environmental liability. It is important to recognize that mergers and acquisitions are only a small aspect of the corporate successor liability arena. Most corporate successor questions in the environmental area involve corporations that operate totally independently from one another. As a result, when one independent corporation is faced with the potential environmental liability of another, the non-polluting party usually seeks immunity under environmental defenses.⁴¹

Mergers and acquisitions of corporations are generally treated entirely differently from other corporate successions. The different treatment is most evident in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).⁴² CERCLA, or Superfund, as it is more commonly known, was enacted in 1980 and amended in 1986.⁴³ Its purpose was to respond to severe hazardous waste disasters that pose a real and immediate threat to the overall population. When a hazardous waste site has been declared a CERCLA or

38. *Id.*

39. *Id.*

40. See Note, *The Implications of CERCLA In Corporate Reorganizations*, 22 CREIGHTON L. REV. 765 (1989); Comment, *CERCLA Liability For Successor Corporations Revisited*, 41 MERCER L. REV. 1027 (1990); Aronovsky & Fuller, *Liability of Parent Corporations For Hazardous Substance Release Under CERCLA*, 24 U.S.F. L. REV. 421 (1990); Note, *CERCLA, Successor Liability, and the Federal Common Law: Responding To An Uncertain Legal Standard*, 68 TEX. L. REV. 1237 (1990); Comment, *The Environmental Due Diligence Defense and Contractual Protection Devices*, 49 LA. L. REV. 1405 (1989).

41. See 42 U.S.C. § 9607(b) (1988) (where certain defenses to environmental liabilities are outlined).

42. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), §§ 101-405 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)).

43. Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613 (1986).

Superfund site, any owner of a facility where hazardous waste was disposed may be liable for clean up cost of the facility.⁴⁴ Section 107 of CERCLA provides that anyone who contracts, agrees, or arranges for disposal of such wastes to a site that is declared a CERCLA or Superfund site may be liable for clean up costs as well.⁴⁵ These clean up costs can be expensive. In 1989 the General Accounting Office estimated that the average cost of cleaning a Superfund site was approximately

44. Section 107(a) states that the owner or operator of a facility or vessel may be liable for recoverable costs and damages of a hazardous waste cleanup. 42 U.S.C. § 9607(a)(1) (1988). Section 101(20) defines owner or operator in the following manner:

(A) The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of the onshore facility or an offshore facility, any person owning or operating such facility, and, (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

(B) In the case of a hazardous substance which has been accepted for transportation by a common or contract carrier and except as provided in section 9607(a)(3) or (4) of this title, (i) the term "owner or operator" shall mean such common carrier or other bona fide for hire carrier acting as an independent contractor during such transportation, (ii) the shipper of such hazardous substance shall not be considered to have caused or contributed to any release during such transportation which resulted solely from the circumstances or conditions beyond his control.

(C) In the case of a hazardous substance which has been delivered by a common or contract carrier to a disposal or treatment facility and except as provided in section 9607(a)(3) or (4) of this title, (i) the term "owner or operator" shall not include such common or contract carrier, and (ii) such common or contract carrier shall not be considered to have caused or contributed to any release at such disposal or treatment facility resulting from circumstances or conditions beyond its control.

(D) The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of the chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

Id. § 9601(20).

45. *Id.* § 9607(a)(3). This section provides that liability can attach to:

any person who by contract, agreement, or otherwise arranged for the disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.

Id.

twenty-five million dollars.⁴⁶ Under principles of corporate successor liability, there is a presumption that the successor is not an owner for purposes of CERCLA. However, once it is determined that the successor corporation is the result of a merger or acquisition, there is a presumption under CERCLA that the successor corporation is the owner.⁴⁷

The rationale for treating merged or acquired corporations the same as their predecessors is simple. When two corporations merge or when one corporation acquires another, the two corporations generally become one entity. Consequently, liability for the harm to the environment becomes indivisible, making both parties jointly and severally liable.⁴⁸ Further, the presumption of liability of a merging or acquiring corporation under CERCLA is reemphasized by section 101(35) of CERCLA.⁴⁹ This section defines "contractual relationship" for purposes of CERCLA liability, noting that land contracts, deeds, or other instruments transferring title or possession of a corporation are included under Section 107.⁵⁰ Thus, the question becomes: What type of property transfer is considered a merger or acquisition for purposes of environmental liability?

The environmental liabilities of the corporate successor depend upon the structure of the acquisition.⁵¹ Where a corporation is acquired by the purchase of all of its outstanding stock, the corporate entity re-

46. U.S. ENVIRONMENTAL PROTECTION AGENCY, A MANAGEMENT REVIEW OF THE SUPERFUND PROGRAM (1989).

47. See 42 U.S.C. § 9607(a)(1) (1988).

48. Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303 (3d Cir. 1985); Kelley v. Thomas Solvent Co., 725 F. Supp. 1446 (W.D. Mich. 1988). See *In re Bergsøe Metal Corp.*, 910 F.2d 668 (9th Cir. 1990); *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983).

49. 42 U.S.C. § 9601(35) (1988).

50. *Id.* This section provides the following:

(A) The term "contractual relationship", for the purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The defendant acquired the facility by inheritance or bequest.

Id.

51. *N.J. Transp. Dept. v. PSC Resources*, 175 N.J. Super. 447, 453, 419 A.2d 1151, 1154 (1980).

mains intact and retains its environmental obligations.⁵² On the other hand, a purchasing corporation becomes liable for environmental claims against the acquired corporation if the acquisition was in the form of a statutory merger or consolidation.⁵³

A merger or acquisition, for purposes of environmental liabilities, can take many forms. These include situations in which:

- (1) the purchaser of assets expressly or impliedly agrees to assume the obligations of the transferor corporation;
- (2) the transaction amounts to a de facto merger;
- (3) the purchasing corporation is merely a continuation of the transferor corporation;
- (4) the transaction is fraudulently entered into for the purpose of escaping liability;⁵⁴ or
- (5) the transfer is made without adequate consideration.⁵⁵

In all of these situations, the purchasing corporation can be held responsible for the clean up costs associated with the transferor corporation's environmental wrongdoings.⁵⁶

Determining whether the blue chip merging or acquiring corporation expressly or impliedly agreed to assume the environmental obligations of the transferor is not difficult. In cases of an express assumption of liabilities, one need only look at the merging or acquiring document itself. However, when the agreement does not contain an express assumption, liability can still attach if an implied assumption exists. Whether there is an implied assumption depends on several factors, including whether the successor had notice of the claim against the predecessor, and whether the predecessor is able to provide relief.⁵⁷ While the factors of notice and the ability of the transferor to provide relief have been deemed "critical," no one factor is controlling.⁵⁸ For example, courts have looked at whether the purchase price of the corporation is

52. *Id.*

53. *Id.*; *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988).

54. *PSC Resources*, 175 N.J. Super. at 453, 419 A.2d at 1154; *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 308 (3d Cir. 1985); *United States v. Vertac Chem. Corp.*, 671 F. Supp. 595, 614 (E.D. Ark. 1987), *vacated*, 855 F.2d 856 (8th Cir. 1988).

55. *PSC Resources*, 175 N.J. Super. at 453, 419 A.2d at 1154 (1980); *Hercules*, 762 F.2d at 308.

56. See cases cited *supra* notes 54-55.

57. *Long v. AT&T Information Sys. Inc.*, 733 F. Supp. 188, 208 (S.D.N.Y. 1990) (citing *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228 (7th Cir. 1986)); *accord*, *EEOC v. Local 638*, 700 F. Supp. 739, 743 (S.D.N.Y. 1988).

58. *Long*, 733 F. Supp. at 208 (quoting *Wheeler*, 794 F.2d at 1228). *But cf.* *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 87 (3d Cir. 1985) (holding that *caveat emptor* is not a permissible defense to liability).

reduced to allow for future environmental claims.⁵⁹

Establishing whether a de facto merger has occurred is a bit more difficult. For purposes of establishing environmental liability, a de facto merger occurs when one corporation is absorbed by another without compliance with the statutory requirements for a merger.⁶⁰ To determine whether a de facto merger has occurred, courts generally address the following four questions:

- (1) [Is there] a continuation of the enterprise of the seller corporation, so that there is continuity of management, personnel, physical location, assets, and general business operations[?]
- (2) [Is there] a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation[?]
- (3) [Does t]he seller corporation cease[] its ordinary business operations, liquidate[], and dissolve[] as soon as legally and practically possible[?]
- (4) [Does t]he purchasing corporation assume[] those obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation[?]⁶¹

All of the elements listed need not be established for a court to find a de facto merger.⁶² A court will consider all of the criteria, and if the court finds that the evidence establishes a de facto merger, the surviving corporation becomes liable for environmental claims against the purchased corporation.⁶³

In determining whether the merging or acquiring corporation is a mere continuation of the purchased corporation, courts generally look at the composition of the management and staff of the purchaser. If, for example, the merging or acquiring corporation has similarities with the acquired corporation in officers, directors, staff, marketed products, customers, and use of trade names, the new corporation will probably be considered a mere continuation of the acquired business.⁶⁴ Courts inter-

59. *Celotex*, 851 F.2d at 90 (citing *Hercules*, 762 F.2d at 312).

60. *United States v. Vertac Chemical Corp.*, 671 F. Supp. 595, 615 (E.D. Ark. 1987), *vacated*, 855 F.2d 856 (8th Cir. 1988) (quoting *Arnold Graphics Indus., Inc. v. Independent Agent Center, Inc.*, 775 F.2d 38, 42 (2d Cir. 1985)).

61. *Hercules*, 762 F.2d at 310; *Vertac*, 671 F. Supp. 595 at 616.

62. *Vertac*, 671 F. Supp. at 616 (citing *Atlas Tool Co. v. IRS*, 614 F.2d 860, 870 (3d Cir. 1980), *cert. denied*, 449 U.S. 836 (1980)).

63. *Id.* at 615; *Hercules*, 762 F.2d at 311.

64. *Kelley v. Thomas Solvent Co.*, 725 F. Supp. 1446, 1457-58 (W.D. Mich. 1988); *Vertac*, 671 F. Supp. at 615.

pret "continuation of the corporation" very broadly. Consequently, even if the merged or acquired corporation acts with a significant amount of independence, the purchaser can still be held responsible for environmental cleanup costs if the purchasing or merging corporation is involved in day-to-day operations or management of the purchased corporation.⁶⁵ The purchaser can even be held liable for environmental cleanup costs if the purchasing corporation could affect hazardous waste disposal decisions if it chooses to do so.⁶⁶

The fourth type of merger or acquisition that will pass environmental liability to the purchasing corporation is the fraudulent conveyance. Frauds are secret and must be tracked by footprints, marks, and signs made by the perpetrators, and discovered by the light of the attending facts and circumstances.⁶⁷ In order to prove that the purchase of a corporation was a fraudulent conveyance completed to avoid environmental liability, the moving party must demonstrate that the purchased corporation had the actual intent to hinder, delay, or defraud its creditors.⁶⁸ Fraudulent intent can be shown by identifying the insolvency or indebtedness of the transferor, inadequate or fictitious consideration, the pendency or threat of litigation, secrecy or concealment, and the fact that the disputed transactions were conducted in a manner differing from usual business transactions.⁶⁹ A deliberate effort to put assets out of the reach of creditors is an example of such an unusual business transaction.⁷⁰

While the rule of imposing liability on the merged or acquired corporation pursuant to CERCLA may seem unduly harsh, it is important to understand the legal rationale behind such a rule. The historical basis for imposing liability on the merging or acquiring corporation "is founded upon the principles of equity that seek to prevent creditors of the transferor corporation from being left without a remedy while the corporation escapes responsibility by transferring its assets into a new form."⁷¹ Yet, there is another more fundamental reason for holding the successor corporation liable; namely, the costs associated with clean up

65. *In re Bergsøe Metal Corp.*, 910 F.2d 668, 672 (9th Cir. 1990); *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557-58 (11th Cir. 1990).

66. *Id.*

67. *Vertac*, 671 F. Supp. at 617 (quoting *Macon Bank & Trust Co. v. Holland*, 715 S.W.2d 347, 349 (Tenn. App. 1986)).

68. *Id.*; *Kelley*, 725 F. Supp. at 1453.

69. *Vertac*, 671 F. Supp. at 618.

70. *Kelley*, 725 F. Supp. at 1455.

71. *Id.* at 1459.

must be borne by someone.⁷² Congress emphasized payment by responsible parties, but if the responsible party cannot be ascertained or cannot pay the necessary sum, federal funds may be used.⁷³ Benefits from the use of the pollutant as well as savings resulting from the failure to use nonhazardous disposal methods inured to the original corporation, its successors, and their respective stockholders.⁷⁴ Such benefits accrued only indirectly, if at all, to the general taxpaying public.⁷⁵ A successor corporation should not escape liability for costs the predecessor corporation imposed on society.⁷⁶ Moreover, it is reasonable to protect the innocent public by holding the successor corporation fully responsible for its predecessor's environmental liabilities.⁷⁷

There are several facets of American environmental laws which indicate that the United States is at least attempting to limit some of the danger faced by corporations seeking to obtain American corporate investments. For example, if the American part of a blue chip corporation has an operating hazardous waste site, under the Resource Conservation and Recovery Act (RCRA) the company is required to obtain a permit to store and treat the hazardous wastes.⁷⁸ Failure to obtain the required permit or to follow what is outlined in the permit could subject the violator to severe civil⁷⁹ as well as criminal penalties.⁸⁰ Moreover, periodic

72. *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988).

73. *Id.* at 91-92.

74. *Id.* at 92.

75. *Id.*

76. *Kelley v. Thomas Solvent Co.*, 725 F. Supp. 1446, 1459 (3d Cir. 1988).

77. *N.J. Transp. Dept. v. PSC Resources*, 175 N.J. Super. 447, 457, 419 A.2d 1151, 1156 (1980).

78. 42 U.S.C. § 6925(a) (1988). This section states in pertinent part:

Not later than eighteen months after October 21, 1976, the Administrator shall promulgate regulations requiring each person owning or operating a facility . . . for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit issued pursuant to this section. Such regulations shall take effect on the date provided in section 6930 of this title and upon and after such date the treatment, storage, or disposal of any such waste . . . is prohibited except in accordance with such a permit.

Id.

79. *Id.* § 6928(a)(3). This section provides that if a violator fails to correct the hazardous waste problem outlined by the government in the time frame specified by the government, then that person or corporation shall be liable for a civil penalty of up to \$25,000 each day of continued noncompliance. This provision also allows the Administrator to suspend or revoke any permit issued to the violator. *Id.*

80. *Id.* § 6928(d). This criminal provision of RCRA provides that anyone who knowingly stores, treats or disposes hazardous waste without a permit may be imprisoned up to 5 years per violation and fined up to \$50,000 per day per violation. *Id.* 42 U.S.C. § 6928(e) states that if someone knowingly endangers the life of another by illegally storing, treating, or disposing hazardous waste, that person may receive up to 15 years in jail. *Id.* § 6928(e).

soil sampling and groundwater testing may be conducted by the state or the Environmental Protection Agency (EPA)⁸¹ The results of the testing, as well as the permits and manifests⁸² with respect to a particular site, give a company seeking to acquire a corporation in America an indication of what type of hazardous waste problems they are buying. Some states, such as New Jersey and Connecticut, even require that compulsory environmental investigations and financial commitment fund clean-ups are completed before a business deal is consummated.⁸³

Many American companies also keep historical documents of sites which indicate where the hazardous wastes have been stored or dumped. This makes it easier for an acquiring or merging corporation to conduct a preliminary assessment (PA)⁸⁴ and site investigation (SI)⁸⁵ before it purchases the corporation and is subsequently held responsible for cleaning up any contaminants.⁸⁶ After the PA and SI are completed, the ac-

81. *See id.* § 6927.

82. The manifests are log sheets that are used to assure that all hazardous wastes generated are designated for treatment, storage, and disposal in, and arrives at treatment, storage, or disposal facilities. *See id.* § 6922(a)(5).

83. *See* Hearne & Dean, *The Pre-acquisition Search For Environmental Risks*, MERGERS & ACQUISITIONS, Jan.-Feb. 1989, at 33.

84. This is also referred to as "Remote Sensing" or "Phase 0." Pilko, *Negotiating a Fair Division of Environmental Costs*, MERGERS & ACQUISITIONS, Mar.-Apr. 1990, at 58-59.

Remote Sensing involves the review of publicly available information, such as regulatory agency files and records, annual reports, and historical aerial photographs, along with visual inspection of facilities from outside the property boundaries. These efforts can be surprisingly useful in identifying major issues that require further investigation, as well as planning the scope of these investigations.

Id. at 59.

85. *Id.* This site investigation is also known as an "Environmental Risk Assessment" or "Phase 1." The site investigation is usually conducted after the letter of intent is signed. This effort is conducted by a team of environmental risk specialists and includes detailed inspections of facilities, interviews with staff managers, reviews with line and staff managers, and reviews of environmental records and reports, among other exercises. The primary purposes of the site investigation are:

(a) Identifying the major environmental liabilities and the risks associated with the business;

(b) Quantifying the liabilities and projecting the timing of expenditures;

(c) Estimating the probability that risks will result in actual liabilities; and

(d) Identifying major capital investments or increased operating costs required by existing or proposed regulatory requirements. *Id.*

86. Section 107 of CERCLA extends liability to all owners of contaminated property, regardless of the circumstances of their ownership, except in a few very narrow instances which include the innocent landowner exception. 42 U.S.C. § 9607(b) (1988). In order for this exception to be granted, the owner must show:

(a) That he exercised due care with respect to the hazardous substance concerned; and

(b) That he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. *Id.* § 9607(b).

quiring corporation can conduct a remedial investigation (RI)⁸⁷ and feasibility study (FS)⁸⁸ to determine how the contaminants should be removed from the soil or groundwater. Once all of this is completed, the purchasing corporation can estimate cleanup costs.

IV. EUROPEAN ENVIRONMENTAL LAW

While virtually any corporation which seeks to merge or acquire another corporation faces potential environmental liabilities, the problems associated with blue chip or Fortune 500 acquisitions are usually more complex. Generally, blue chip acquisitions have an international flavor. Thus, the acquiring corporation must be familiar not only with CERCLA, but with the environmental laws of other countries as well. The purchasing corporation often has very little guidance as to the content of foreign environmental laws. Many European laws are in rudimentary form, especially hazardous waste laws. The environmental problems which seem to concern Europeans most involve clean air, water, or problem areas that involve the global commons.⁸⁹ Little emphasis has been placed on the development and enforcement of hazardous waste laws. However, as blue chip mergers and acquisitions

87. Pilko, *supra* note 84, at 59. Here, Pilko notes, "[I]f data on soil and groundwater contamination or asbestos contamination is unavailable, inadequate or unreliable, Field Testing, or Phase 2, may be desirable and, in some cases, essential as a follow up to Environmental Risk Assessments." *Id.* The objectives of field testing or remedial investigation are:

- (a) Confirming or denying the existence of contamination;
- (b) Delineating the extent of any contamination; and
- (c) Estimating the cost of cleanup. *Id.*

88. The feasibility study may also establish the estimated cost of cleanup. *See Hearn & Dean, supra* note 83, at 37.

89. Probably the best example here would be the concentration of the European Community as well as the rest of the world in implementing the Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1554 (ratified by the United States Mar. 14, 1988, entered into force Jan. 1, 1989) [hereinafter Protocol]. Negotiated under the auspices of the United Nations Environment Programme (UNEP), the Protocol seeks to "protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it." *Id.* preamble. Ozone is best described in Comment, *Under-estimating Ozone Depletion: The Meandering Road To The Montreal Protocol and Beyond*, 16 *ECOLOGY L.Q.* 407, 408 (1989) (authored by Diane M. Doolittle):

Ozone is a three-atom molecule that constitutes less than one molecule in every 100,000 in the upper atmosphere. Ozone is produced when the sun's ultraviolet radiation with wavelengths below 242 nanometers reacts with ordinary oxygen. It is destroyed when it reacts with radiation at longer wavelengths (wavelengths between 230 and 290 nanometers) or when it reacts with other substances such as oxides of nitrogen or chlorine. Thus, ozone is constantly being produced and destroyed in the atmosphere.

As noted by Dr. Robert Watson at NASA, "without the ozone shield Earth dwellers would stand about as much chance of survival as a lobster at a clambake." *Id.* at 409.

involving European subsidiaries become more prevalent, it is virtually inevitable that European hazardous waste laws will have to be recognized by American corporations.

One reason for the lack of intricate hazardous waste laws in Europe is the relatively recent focus on the subject in all countries, including the United States. In 1976 Congress enacted the Resource Conservation and Recovery Act (RCRA).⁹⁰ The RCRA, which was amended in 1984,⁹¹ was designed to govern facilities which store, treat, and dispose of hazardous wastes. This Act and CERCLA are regarded as the impetus behind European hazardous waste laws.

A. European Community Directives

The European Community (EC) is the legal body which establishes environmental principles for all of Europe. However, principles promulgated by the EC are only directives and are designed only to give each individual country some guidance in establishing that country's own environmental policies. Nevertheless, the members of the EC are expected to enact some form of each EC directive, usually by a certain date.⁹²

One of the most notable waste directives enacted by the EC is the Council of European Communities Directive on Waste (EC Dir. 75/442).⁹³ When enacted in the mid-1970s, this directive was seen by the EC as essential to the protection of the health and safety of humans and

90. 42 U.S.C. § 6901 (1983).

91. *Id.* (Supp. 1990). These amendments are known as the Hazardous and Solid Waste Amendments of 1984.

92. The EC is comprised of Belgium, Denmark, France, Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, and the United Kingdom. The article *Hazardous Waste Exports: A Leak In The System Of International Legal Controls*, 19 ENVTL. L. REP. (Envtl. L. Inst.) 10171 (1989), describes the background of the formation of the EC:

[The EC] derives its legislative power from the treaty of Rome that established the EC in 1957. The member states are bound by the treaty to take all necessary steps to assure that directives adopted by the Council are implemented. They have individual discretion as to the precise measures required to accomplish the directives.

The EC Commission, consisting of citizens from each of the member countries, initiates EC policy by making proposals to the Council of Ministers or EC Council, which has decision making authority. The Council consists of officially appointed delegates from each member state. The European Parliament has authority to dismiss the Council if there is a two-thirds vote for such action, but has no independent legislative authority. The Parliament is frequently the forum for political debate, because its members are elected at large from political rather than national groups. The EC Court of Justice, consisting of 13 judges, has authority to enforce measures enacted by the Council. It also has authority to void legislation of member states that is inconsistent with EC law.

93. Council of European Communities Directive on Waste, 75/442/EEC (1975).

the environment. It was also viewed as an avenue toward further community action throughout Europe and the harmonization of waste legislation. The directive defines waste as "any substance or object which the holder disposes of or is required to dispose of pursuant to the national law in force."⁹⁴ The directive indirectly includes hazardous or special wastes as it makes only a few narrow exceptions from its definition.⁹⁵

EC 75/442 leaves wide latitude to each member state with respect to implementation of the directive. Article 2 states that "without prejudice to this Directive, Member States may adopt specific rules for particular categories of waste," and article 3 gives the states the power to develop a recycling plan.⁹⁶ Article 4 notes that member states should take necessary measures to ensure that wastes are disposed without harming the humans or the environment.⁹⁷ However, articles 5 through 10 give the members the power to determine how they are going to accomplish this goal.⁹⁸ In short, while the EC Directive addresses the fact that hazardous waste storage, treatment, and disposal are problems in Europe, the directive is ultimately generic. This ambiguity gives the individual member states even more power with respect to implementation than one might suspect. More importantly, it severely curtails a key objective of 75/442, namely harmonizing waste legislation. Fortunately, several European states have established hazardous waste laws which are more precise than the EC directive.

B. West German Law

The Federal Republic of Germany (West Germany) has rather comprehensive hazardous waste laws, some of which predate their U.S. counterparts. In 1972 West Germany passed an outline waste disposal law

94. *Id.* art. 1.

95. *Id.* art. 2, sec. 2. This section states:

The following shall be excluded from this directive:

- (a) radioactive waste;
- (b) waste resulting from prospecting, extraction, treatment and storage of mineral resources and the working of quarries;
- (c) animal carcasses and the following agricultural waste: fecal matter and other substances used in farming;
- (d) waste waters, with the exception of waste in liquid form;
- (e) gaseous affluent emitted into the atmosphere;
- (f) waste covered by specific community rules.

96. *Id.* arts. 2-3.

97. *Id.* art. 4.

98. *Id.* arts. 5-10.

known as the Federal Waste Disposal Act.⁹⁹ This Act, which was amended in 1986,¹⁰⁰ defines and regulates the authorities responsible for controlling pollution, and states the conditions and requirements for the collection, treatment, and disposal of certain substances and mixed and dangerous wastes.¹⁰¹ The Act requires that "waste shall be so disposed of that the welfare of the community shall not be impaired."¹⁰² This rather ambiguous phrase is similar to the language of EC 75/442. However, the West German provision is different from the EC directive in that the generator of the wastes is required to make the wastes available to the public authority required to dispose of it. Thus, in many instances, it is the government itself that disposes of the wastes. Consequently, the government may ensure that the public health and welfare of the citizens are not placed in a perilous position by the disposal.¹⁰³ Generally, the wastes are disposed of by the local authorities, either the Districts or "Kreise," or the independent cities which do not belong to any district but are themselves districts or urban areas.¹⁰⁴

In West Germany, wastes may be treated, stored, and deposited only in facilities licensed to accept the type and quantities of wastes in question.¹⁰⁵ In addition, wastes may be collected and transported only by licensed persons and only when the disposal plant has certified it will receive the wastes.¹⁰⁶ The government also has the power to issue special decrees, prescribing that harmful products like batteries, paints, or dyes must be specifically labeled or have to be taken back by the manufacturers.¹⁰⁷ Insofar as one cannot avoid producing or is unable to reuse wastes, such wastes must be disposed of in special facilities.¹⁰⁸

C. French Law

France has also enacted a comprehensive body of hazardous waste

99. Gesetz über die Vermeidung und Entsorgung von Abfällen (Abfallgesetz-AbfG) vom 27. August 1986, 1986 Bundesgesetzblatt I [BGB1.I] 1410, corrected at 1501.

100. *Id.*

101. *Id.*

102. *Id.* art. 2(1).

103. *Id.* art. 3.

104. N.J. Transportation Dept. v. PSC Resources, 175 N.J. Super. 447, 419 A.2d. 1151 (1980).

105. ENVIRONMENT COMM. WASTE MANAGEMENT POLICY GROUP, NATIONAL LEGISLATION AND INTERNATIONAL RULES APPLICABLE TO HAZARDOUS WASTE MANAGEMENT IN OECD MEMBER COUNTRIES IX-39, reprinted in EUROPEAN ENVIRONMENTAL LAWS & REGULATIONS (2d ed. 1983) [hereinafter OECD REPORT].

106. 1986 BGB1.I art. 4(3).

107. *Id.* art. 14.

108. *See id.* § 4(1).

legislation to deal with its tremendous hazardous waste problem. In 1974 a report from the Interministerial Study Group for the Disposal of Solid Waste (GEERS) estimated that every year France produces eleven million tons of household wastes and ten times that amount in mining residues; it also produces eight million tons of packaging material, of which four hundred thousand tons is plastic mixed with household refuse.¹⁰⁹ The Act of July 15, 1975, is the primary hazardous waste law governing France.¹¹⁰ This law applies not only to wastes in general, but also establishes a special category of wastes, namely those which are capable of producing "des effets nocifs" or "denuisances."¹¹¹ Article 10 of the Act allows the authorities to intervene ex-officio to take over the treatment of dangerous toxic wastes. Article 10 further states that the ministerial departments may give approved treatment plants exclusive rights to treat such wastes in a geographical area.

One of the most important features of the 1975 law was the establishment of the Agencie Nationale pour la Recuperation et l'elimination des Dechet, also known as ANRED. ANRED's mission is facilitation and recuperation, or to undertake such operations where public or private means are lacking. ANRED pursues these objectives by aiding the creation of waste treatment installations and waste exchanges, promoting the development of new technologies for recuperating and eliminating wastes, and providing technical assistance to local authorities and firms with waste problems. Furthermore, ANRED supports technical research and demonstration projects, participates in the development of waste treatment facilities, and assists with efforts to clean up old hazardous waste sites.¹¹²

On July 19, 1976, France enacted Law 663 concerning the classification of installations for environmental protection.¹¹³ The primary purpose of Law 663 was to regulate source control pollution of industry and agriculture. This law requires that hazardous waste facilities obtain prefect authorization. Dumping and incineration are also subject to authorization. Article 9 of the Act requires disposal to be undertaken in such a way as to recuperate reusable elements.¹¹⁴

109. M. DESPAX, *THE LAW AND PRACTICE RELATING TO POLLUTION CONTROL IN FRANCE* 78 (2d ed. 1982).

110. *Id.* at 79-80.

111. Law No. 75-633 of July 15, 1975, art. 8.

112. Williams, *A Study of Hazardous Waste Minimization in Europe: Public and Private Strategies to Reduce Production of Hazardous Waste*, 14 B.C. ENVTL. AFF. L. REV. 165, 173 (1987).

113. *Id.* at 174 n.28.

114. *Id.*

On July 12, 1977, France enacted Law 771 implementing the Law of July 15, 1975.¹¹⁵ Under this law, a manufacturer or importer is required to submit full particulars to the authorities before a new chemical is manufactured or imported.¹¹⁶ The authorities then assess the risk of such chemical to human life and the environment.¹¹⁷ The decree lists certain toxic and dangerous wastes for which the administration can ask the producers, transporters, and eliminators to disclose how they are producing, transporting, and eliminating wastes.¹¹⁸ It also states that the wastes can only be treated at installations approved by the administrator.¹¹⁹ As of 1982 there were approximately twenty-five centers for the treatment of industrial waste, with a capacity of two to eighty thousand tons,¹²⁰ and there was a list of four hundred categories of activities subject to the authorization of the prefect, after public inquiry and impact analysis.¹²¹

There are also two circulars worth noting. The circular of January 22, 1980, sets out the technical instructions for the discharge of industrial wastes.¹²² It sets criteria for site selection of hazardous waste dumps, the conditions for accepting such wastes, and the management controls of such operations.¹²³ The circular of March 23, 1983, gives similar instructions regarding the incineration of industrial waste.¹²⁴

D. United Kingdom Law

Hazardous wastes in the United Kingdom are primarily governed by national legislation and are subject to control under two Acts of Parliament: the Town & Country Planning Act of 1971 (Scotland) (1971 Act) and the Pollution Act of 1974 (1974 Act). While the 1971 Act generally provides the planning background and planning control to which all land is subject, it also governs many of the U.K.'s hazardous waste problems. The 1974 Act repealed the entire text of the Deposit of Poisonous Waste Act.¹²⁵ The Deposit of Poisonous Waste Act was passed to deal with the cases of unauthorized dumping of toxic wastes on land. The 1974 Act as amended in 1980 sought to keep this provision

115. 1987 EUR. ENVTL. Y.B. 468.

116. *Id.*

117. *Id.*

118. OECD REPORT, *supra* note 105, at IX-41.

119. M. DESPAX, *supra* note 109, at 82.

120. *Id.*

121. Williams, *supra* note 112.

122. *Id.*

123. 1987 EUR. ENVTL. Y.B. 468.

124. Williams, *supra* note 112.

125. Control of Pollution Act, 1974, ch. 40, § 108, sched. 4.

intact by enacting the Control of Pollution (Special Waste) Regulations of 1980.

The 1974 Act defines wastes as follows: (a) any substance which constitutes scrap metal or an effluent or any unwanted surplus substance arising from the application of any process, and (b) any substance or any article which requires disposal because of being broken, worn out, contaminated or otherwise spoiled.¹²⁶ Similarly, the Special Waste Regulations of 1980 define special wastes as wastes which contain a chemical compound specifically listed in the regulations and which by reason of the chemical in the waste has a flash point of twenty-one degrees Celsius or less, or is dangerous to living things.¹²⁷ Special wastes are considered dangerous if: (a) a single dose of not more than five cubic centimeters would be likely to cause death or serious damage to tissue if ingested by a child weighing twenty kilograms, or (b) exposure to it for fifteen minutes or less would be likely to cause serious damage to human tissue by inhalation, skin contact, or eye contact.¹²⁸

Section 1 of the 1974 Act requires regional waste disposal authorities (WDAS) to ensure that adequate arrangements exist within their areas for the purpose of disposing all wastes (domestic, commercial, and industrial wastes) likely to require disposal in their areas. This section also provides that such arrangements be made by the private sector as well as by the authorities. In 1987 it was estimated that ninety-eight percent of special waste disposal in the United Kingdom was controlled by the private sector.¹²⁹ Most wastes in the United Kingdom are the products of the chemical, pharmaceutical, and metal processing industries, many of which recycle, reclaim, treat, or otherwise dispose of wastes on site, the balance going to contractors to transport and to dispose of on their licensed sites.¹³⁰ The disposal of these wastes to landfill sites is subject to strict rules regarding the selection of the site, sampling, analysis, and specification of the waste and skilled operation at the site.¹³¹

E. Belgian Law

Belgium has enacted some of the most stringent environmental laws in Europe. The law of July 1974, completed by the Royal Decree of

126. 1987 EUR. ENVTL. Y.B. 483.

127. Williams, *supra* note 112, at 181.

128. *Id.*

129. 1987 EUR. ENVTL. Y.B. 484.

130. *Id.*

131. *Id.*

February 9, 1978, was enacted following the discovery of clandestine deposits of toxic wastes which were subsequently taken over by the authorities.¹³² This Act was aimed primarily at protecting the population, workers, and the environment in general from the dangers of toxic and hazardous wastes.¹³³ Article 1 of the Decree broadly defines toxic wastes as unused or unusable products or by-products, residues, and wastes resulting from an industrial, commercial, craft, agricultural, or scientific activity which could present a danger of intoxication to living beings or nature.¹³⁴ Article 2 contains a list of toxic materials and prohibits the sale, purchase, free or conditional gift, holding, storing, processing, destruction, neutralization, or disposal of toxic wastes, as well as other affiliated activities, except by authorization or declaration.¹³⁵ Articles 3 and 4 of the Act govern the authorization to exploit storage facilities and installations for the destruction, neutralization, or disposal of toxic wastes in centers approved by the King,¹³⁶ called Centers for the Destruction, Neutralization, and Disposal of Toxic Waste.¹³⁷

The application for approval of the installation is introduced at the same time as the application for an operating authorization.¹³⁸ The authorities granting the operating authorization and the procedures to be followed are the same as those provided for in class 1 establishments governing the General Regulations for Protection at Work.¹³⁹ In addition to the required information mentioned above, the authorization must contain information on the nature and methods of disposal envisioned for residues from the treatment of waste centers.¹⁴⁰ The authority granting the authorization must also obtain the opinion of the Commission of Approval.¹⁴¹ In the event of an unfavorable opinion, the authorization is refused.¹⁴² The Commission is required to issue a decision within two months of the application.¹⁴³

132. L. SUTENS, *THE LAW AND PRACTICE RELATING TO POLLUTION CONTROL IN BELGIUM AND LUXEMBOURG* 133 (2d ed. 1982).

133. *Id.*

134. *Id.*

135. *Id.* at 133-34.

136. OECD REPORT, *supra* note 105, at IX-36.

137. *Id.*

138. *Id.*

139. *Id.* (citing arts. 2-15, 17, 18-20, 23).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

V. EFFECTS OF ENVIRONMENTAL PROBLEMS ON A MERGER OR ACQUISITION

The effects of a blue chip or Fortune 500 merger or acquisition without full knowledge of applicable American and European environmental laws can be devastating to the acquiring executive. For example, as recounted in the article "Negotiating a Fair Division of Environmental Costs" by Mr. George Pilko, one executive failed to take the appropriate steps to accurately gather all of the information it could regarding the hazardous waste problems of the company it acquired.¹⁴⁴ After the acquisition, the acquiring corporation was compelled to pay over 100 million dollars to clean up a site.¹⁴⁵ Further, seventy-four hazardous waste companies have gone bankrupt in the United States, and it is estimated that over the next fifty years, twenty-five to thirty percent of all hazardous waste facilities will file for bankruptcy.¹⁴⁶ These factors indicate the magnitude of the potential environmental liability that can be incurred as a result of purchasing a corporation with hazardous waste sites.

In order to appreciate the magnitude of the potential hazardous waste liability corporations may face when acquiring blue chip or Fortune 500 investments, it is essential to understand the potential problem faced by acquiring any corporation with hazardous waste problems. Generally, whenever there are hazardous waste or environmental issues in a merger or acquisition, approximately eighty to ninety percent of those issues are resolved before consummation, and the deal goes forward.¹⁴⁷ One reason for the high success rate is that there has been a growing tendency for companies to resolve the environmental issues by quantifying the environmental costs and then adjusting the purchase price accordingly.¹⁴⁸ Nevertheless, more mergers than ever before are being thwarted by hazardous waste liabilities. As recently as 1984 or 1985, environmental liability was a technical point to which corporations gave little attention.¹⁴⁹ The environmental question was the last question

144. Pilko, *supra* note 84, at 58.

145. *Id.*

146. See Nelson & Young, *An Environmental Dilemma: Keeping Solvent Companies Solvent When a Hazardous Waste Facility Goes Bankrupt*, VA. LAW., Mar. 1990, at 25; 42 U.S.C. § 9607(a)(1) (1988); see also Cosetti & Friedman, *Mid-Atlantic National Bank, Kovacs, and Penn Terra: The Bankruptcy Code and State Environmental Law—Perceived Conflicts and Options for the Trustee and State Environmental Agencies*, 7 J.L. & COM. 65 (1987).

147. Heller, *supra* note 26, at 14.

148. *Id.*

149. See Simon, *Deals That Smell Bad*, FORBES, May 15, 1989, at 49; Heller, *supra* note 26, at 14.

asked in a merger or acquisition, if it was asked at all.¹⁵⁰ Now, it is probably the first question asked.¹⁵¹ Moreover, in the course of closing an acquisition, deciding what to do about environmental problems at a site becomes the most heavily negotiated part of the contract.¹⁵²

For stock pickers and bankers alike, getting good information on companies' toxic liabilities is extremely difficult. Often, a company does not have accurate information on its own environmental liabilities.¹⁵³ Consequently, buyers of corporations are demanding more and more time to complete due diligence. This generally means that testing to determine whether there is a hazardous waste problem takes anywhere from sixty days to six months.¹⁵⁴ Cleanup costs of a site can run anywhere from 200,000 to over 500 million dollars.¹⁵⁵ Thus, damaging hazardous waste information or little or no information may compel a buyer to cut the sales price and, in many instances, actually ruin a deal.¹⁵⁶ Two of the best known blue chip mergers and acquisitions that were destroyed as a result of potential hazardous waste liabilities were the 660 million dollar proposed acquisition by the Sterling Group of Koppers Chemical Company and the proposed 300 million dollar acquisition of Grow Group Inc. by PPG Industries.

Sterling Group of Houston is a private financial organization founded by Mr. Gordon A. Cain in 1982.¹⁵⁷ In handling mergers and acquisitions with hazardous waste problems, Sterling has used a standard approach, maintaining that environmental liabilities are the responsibility of the seller.¹⁵⁸ Every Sterling deal that has fallen apart was the result of a seller unwilling to accept full responsibility for its environmental liabilities.¹⁵⁹ One such deal was the proposed Sterling-Koppers Chemical merger.

Koppers manufactures construction materials and chemicals, specializing in aggregates, rocks such as sand, gravel, and crushed stone used as construction materials. Koppers also manufactures coal tar pitch

150. Heller, *supra* note 26, at 14.

151. *Id.*

152. *Id.*

153. *Chemical Hot Spots Prove Stumbling Block For Merger Movement*, CHEM. MKTG. REP., Mar. 13, 1989, at 7, 50 [hereinafter *Chemical Hot Spots*].

154. Heller, *supra* note 26, at 15.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

for electrodes by refining coal tar, a byproduct of coke production.¹⁶⁰ It also sells poles to electric and telephone utilities, and makes and sells creosote to the railroad industry.¹⁶¹ Koppers has approximately 11,000 employees.¹⁶²

On July 5, 1989, Sterling announced that it planned a leveraged buyout of Koppers Chemical.¹⁶³ However, prior to consummating the deal, an independent contractor hired by Sterling learned that Koppers' tar and wood division had extensive environmental problems which would cost between 150 and 200 million dollars to clean up.¹⁶⁴ Sterling spent a tremendous amount of money on lawyers and consultants,¹⁶⁵ and Sterling determined that in order for the deal to be completed, Beazer PLC, the owner of Koppers Chemical, would have to indemnify Sterling against the environmental liability costs absorbed by Sterling.¹⁶⁶ Beazer refused to make such a guarantee. Sterling reasoned that even if Koppers agreed to an indemnification, Koppers' assets were so thinly capitalized that the purchase of the company would be highly risky.¹⁶⁷ Consequently, Sterling called off the deal.

On August 19, 1988, PPG Industries announced that they had entered into a definitive agreement through which the Grow Group would merge with a wholly owned subsidiary of PPG.¹⁶⁸ Under the agreement approved by the boards of both firms, Grow Group shareholders would have received 16.625 dollars per share of common stock with about 14 million shares outstanding on a fully diluted basis.¹⁶⁹ Grow also granted PPG an option to purchase approximately 2.8 million shares of Grow's authorized but unissued common stock at 16.625 dollars per share.¹⁷⁰ The estimated cost of the transaction was just under 300 million dollars, including the assumption of Grow's debts.¹⁷¹

160. *Foreign Investment in the U.S.*, MERGERS & ACQUISITIONS, Mar.-Apr. 1989, at 172, 173.

161. *Id.*

162. *Id.*

163. *Chemical Hot Spots*, *supra* note 153, at 7. Beazer had been trying to sell Koppers Chemical after acquiring the company's construction business in a 1.8 billion dollar hostile takeover in June 1988.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. N.Y. Times, Aug. 20, 1988, § 1, at 35, col. 3.

169. *Id.*

170. *Id.*

171. Hafey, *PPG To Acquire Grow Group For 300 Million Dollars*, Reuter Fin. Rep., Aug. 19, 1988.

The New York City-based Grow Group is a leading manufacturer of trade paints and chemical coatings,¹⁷² specialty chemical and automotive coatings, health and beauty aids, over-the-counter swimming pool chemicals, and household cleansing products.¹⁷³ Pittsburgh-based PPG is one of the world's largest manufacturers of flat glass, fiber glass, coatings, chemicals and medical electronics, with 1987 sales of 5.2 billion dollars.¹⁷⁴ PPG sought Grow to compliment PPG's coatings and resins group.¹⁷⁵ The merger was contingent upon PPG's right to terminate the merger agreement for any reason during the ten day due diligence period which ended on September 6, 1988.¹⁷⁶

At the start of the proposed merger, things looked bright for both Grow Group and PPG. Standard and Poors said that it was considering upgrading its rating of the Grow Group's eighty million dollar debt because of the proposed merger.¹⁷⁷ Initial reaction to the merger was favorable. Mr. Edward Cimilucca of Shearson Lehman Hutton said the offer represented a fair value, and the Grow Group made a nice fit with PPG in the areas of paints, sealants, and swimming pools.¹⁷⁸ Mr. Robert Curran of Merrill Lynch said the acquisition of Grow Group would roughly double PPG's trade coatings business.¹⁷⁹

Immediately before the deal was to be consummated, a stroke of bad luck hit Grow Group. On September 2, 1988, Grow Group reported no profit or loss for the previous fiscal year ending June 30, 1988. Grow did report a third quarter loss of six hundred ninety-five thousand dollars, which amounted to a loss of eight cents per share.¹⁸⁰ On September 3, 1988, at approximately one a.m., a chemical fire occurred at a Grow Group warehouse in the City of Commerce, California.¹⁸¹ Local authorities ordered evacuation from the area around the plant because of a gas cloud which resulted from the fire, and the event received considerable media attention.¹⁸² Twenty thousand people were evacuated from the Eastern Los Angeles community, although health officials saw no long-

172. N.Y. Times, Aug. 20, 1988, § 1, at 35, col. 3.

173. *U.S. Mergers and Acquisitions*, MERGERS & ACQUISITIONS, Jan.-Feb. 1989, at 69, 86.

174. *PPG Terminates Grow Merger Agreement*, PR Newswire, Sept. 6, 1988.

175. N.Y. Times, Aug. 20, 1988, § 1, at 35, col. 3.

176. *Grow Group Reports Year-End, Fourth Quarter Results*, PR Newswire, Sept. 2, 1988.

177. *Standards and Poors May Upgrade Grow Group, Affirms PPG*, Reuter Fin. Rep., Aug. 23, 1988.

178. *Grow Group Becomes Part of PPG's Coating and Resins Sections*, CHANGES, Aug. 25, 1988, at 4.

179. *Id.*

180. *Grow Group Reports Year-End, Fourth Quarter Results*, *supra* note 176.

181. *PPG Industries Terminates Merger Agreement*, PR Newswire, Sept. 6, 1988.

182. *Id.*

term impact or health risks from the leak.¹⁸³ On Sunday, September 4, 1988, at about 5:20 a.m., another barrel of the same chlorine compound began to vaporize and drift over an area of nearby Montibello, requiring the evacuation of about one thousand residents.¹⁸⁴ This was the third chemical spill that Grow Group had experienced in less than one month. Grow Group was previously cited by the Health Services Department on August 10, 1988, after a similar chemical spill had occurred at the Commerce plant.¹⁸⁵ On September 6, 1988, PPG called off the proposed merger.¹⁸⁶

Grow Group immediately felt the effects of the termination of the proposed merger. On September 7, 1988, the value of Grow Group's stock dropped 25.3 percent, the largest decline on the Big Board that day.¹⁸⁷ Moreover, Standard and Poors affirmed the ratings of Grow Group Inc. after the dissolution of the merger.¹⁸⁸ The failure of the PPG-Grow Group merger illustrates how the cancellation of a merger or acquisition because of a hazardous waste problem can be time consuming and extremely expensive.

VI. CONCLUSION

While blue chip mergers are on the increase, the bite of potential CERCLA liability cautions corporations from entering into hastily made agreements. In essence, CERCLA has made corporations which seek to acquire other large corporations fear not so much the known liabilities but the unknown baggage which may come with the purchase, especially environmental liabilities. One of the purposes of CERCLA was to force corporations to ponder the consequences of hazardous waste pollution before thinking about immediate profits.

Further, in terms of corporations that seek to merge or acquire blue chip corporations with European investments, the 1989 European acquisition figures establish two critical facts. First, while mergers and acquisitions in Europe are on the rise, the most attractive European investments appear to be in the areas plagued most by environmental problems and environmental liabilities. Second, the majority of these

183. *PPG Drops Offer To Acquire Grow*, N.Y. Times, Sept. 7, 1988, at D5, col. 2.

184. *Grow Group Deal Scrapped On The Heels of Chemical Leaks*, L.A. Times, Sept. 7, 1988, § 4 (Business), at 5, col. 5.

185. *Ramos & McGraw, AQMD to Press Charges Against Chemical Plant*, L.A. Times, Sept. 7, 1988, § 2 (Metro), at 1, col. 5.

186. *PPG Industries Terminates Merger Agreement*, *supra* note 176.

187. *Id.*

188. *Standard and Poors Affirms Debt Grades of Grow Group*, Reuter Fin. Rep., Sept. 7, 1988; *see also Moody's Changes Direction of Grow Review*, Reuter Fin. Rep., Sept. 8, 1988.

mergers and acquisitions are small dollar transactions. Combine these facts with the fact that European hazardous waste laws are beginning to be enforced, and the potential for an acquisitional disaster, such as what almost occurred in the Sterling and PPG mergers, becomes imminent. Thus, corporations need to be familiar with the European hazardous waste laws and need to spend the extra time and money to investigate all proposed investments which involve hazardous waste sites. Once this is accomplished, corporations can fully and accurately determine if an acquisition or merger involving international subsidiaries will be in their best interest.

